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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM BERNARD MORGAN, Defendant and Appellant.	B208213 (Los Angeles County Super. Ct. No. KA081044)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed.

Jeffrey Lewis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Theresa A. Patterson and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

William Bernard Morgan appeals from the judgment entered following his conviction by jury of vehicular manslaughter with gross negligence (Pen. Code, § 192, subd. (c)(1)). The court sentenced appellant to prison for four years. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that in January 2007, appellant was employed as an operator of a pilot vehicle which escorted oversized vehicles. On January 26, 2007, appellant got up at 3:30 a.m. About 4:30 a.m., he drove his Dodge Ram truck from his home in Vacaville, California to Williams, California. The drive took about 45 minutes and, en route, appellant bought a donut. Once in Williams, appellant prepared his truck for escort service, then slept about one hour until 6:45 a.m.

About 7:45 a.m., appellant, driving his truck, escorted another vehicle carrying pools to Brawley, California. At 9:30 p.m., appellant arrived in Brawley and the other vehicle dropped off the pools. Appellant told the driver of the other vehicle the locations of a motel and a place to eat. About 10:30 p.m., appellant began driving home to Vacaville. En route, he stopped at a casino to gamble, later ate at a truck stop, and put gas in his truck, which took about 30 minutes. Appellant continued driving home. About 2:00 a.m., on January 27, 2007, appellant asked a California Highway Patrol (CHP) officer for directions.

About 3:00 a.m., appellant was driving his truck in the number three lane of the westbound 210 Freeway, east of San Dimas. His cruise control was set at 65 miles per hour. Appellant saw traffic ahead. CHP had stopped westbound traffic on the freeway. Appellant saw traffic in his lane and moved to lane number two. Shortly thereafter, and although appellant had enough time to stop, he collided into at least two vehicles, causing a chain collision involving several vehicles.

One of the cars struck by appellant's truck was being operated by Carlton Collins. Collins was injured as a result of the collision. Chris Merriman, Justen Antillon, and Brad Krauss were in the driver's seat, front passenger's seat, and back seat, respectively,

of another vehicle that was damaged. Merriman was injured and Krauss was killed. The parties stipulated that Krauss "died from trauma to his head and neck due to being struck by the defendant's vehicle."

Appellant indicated to a CHP officer during an interview that appellant was paid by the mile while escorting a truck. After the escorted truck arrived at its destination, appellant was not paid for his return journey. Appellant said his not getting paid when he came back was "the bad part about it." Appellant indicated he could place a call to determine if "there is anything in the area coming back."[1]

A CHP officer testified the collision resulted from appellant driving at an unsafe and high rate of speed and failing to realize that traffic had stopped. Appellant had not braked for traffic. The road on which appellant had been driving descended to the scene of the collision, so appellant should have seen the stopped traffic from about half-a-mile away. Appellant did not have sufficient rest within the 24-hour period prior to the collision.

CONTENTIONS

Appellant presents related claims that the trial court erroneously (1) denied appellant probation and (2) imposed the middle term.

DISCUSSION

Appellant's Sentencing Claims Are Unavailing and, In Any Event, the Trial Court Properly Denied Probation and Imposed the Upper Term.

1. *Pertinent Facts.*

a. *The Probation Report.*

The probation report reflects as follows. Appellant, who was born in 1934, was driving in a fatigued condition with no sleep within about the last 23 hours prior to the instant collision. The decedent's parents suffered emotional breakdowns necessitating hospitalization, and the decedent's funeral costs were about $9,800.

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[1] The tape of the interview was played to the jury.

According to the probation officer, appellant had no adult criminal history. However, the report also reflects that appellant was convicted in 2006 for violations of Vehicle Code sections 14603 (restriction placed on driver's license) and 21460, subdivision (a) (driving to the left of double solid lines). Both matters were infractions.

The probation officer stated that "[u]nexpected circumstances on the freeway combined with a moment of inattention came together to create a horror that no family should have to endure. On the other hand, it is the responsibility of all licensed drivers to be prepared for the task and to drive defensively." The report indicated there were no aggravating factors, listed as a mitigating factor that appellant had no prior record, and recommended probation. The report also recommended imposition of a lower term in prison if the court did not grant probation.

b. *Appellant's Sentencing Memorandum.*

Appellant filed a sentencing memorandum which reflected, inter alia, that "[t]he amount of monetary loss to the victims family is unknown," civil litigation was pending, and appellant was insured "in the amount of $100,000/300,000." Appellant conceded in the memorandum that he was an active participant in the present offense.

The memorandum indicated appellant was remorseful, and had been remorseful at the scene. The memorandum stated, "[t]he tape recording played in court was recorded six hours after the accident while the defendant was still receiving treatment in the emergency room, after [appellant] had gone over the events several times, off tape, with the officers." The memorandum also stated, "[Appellant] is a [quiet] individual by nature, not given to overt displays of emotion. His natural taciturn personality is compounded by a pending civil suit which by [its] nature limits statements of remorse and admissions of fault."

The People's sentencing memorandum indicated there were no aggravating factors and appellant had no prior criminal record. The People recommended that the court sentence appellant to prison for the lower term of two years.

c. *The Trial Court's Ruling.*

(1) *The Trial Court's Denial of Probation.*

At the 2008 sentencing hearing, appellant argued, inter alia, he was 74 years old and had been in the military. The court indicated it had considered the probation report, the parties' sentencing memoranda, and appellant's character letters. One such letter came from his sister and indicated appellant was the sole caretaker for another sister. The court also heard statements from the decedent's family.

Appellant argued there was a range of conduct, from street racing to driving on a shoulder, which fell within the definition of the offense which he committed. The court commented that street racers were normally not "grossly impaired."

The court then stated, "Probation is statutorily available as an option for this court. [¶] Rule 4.414(a), I am required to take into account the seriousness of the crime. In our case we had death. We had the defendant making willful and deliberate actions that led directly to the death. The defendant inflicted physical injury on Mr. Krauss, certainly emotional injury on the individuals and family members, third parties. We have substantial monetary losses to the victim and family. Defendant factually caused the crime and thus was an active participant."

The court then stated, "Rules relating to the defendant, 4.414(b), the defendant has no record of substance, with the exception of one minor traffic ticket and one accident for which no blame was assessed. [¶] However, also under 4.414(b), the defendant did not appear remorseful on the tape."

The court further stated, "And the court is required to consider under rule 4.410, objectives of sentencing, the protection of society, punishment for misdeeds, and deterren[ce]. [¶] I would note that the probation officer did not hear the tape, did not see the tape, and did not hear the testimony of the witnesses that were presented.

I wholeheartedly disagree with the probation officer's conclusion that this was an unfortunate accident. It was not an accident. [¶] The defendant is denied probation."[2]

(2) *The Trial Court's Imposition of the Middle Term.*

The court then stated, "Now, let's review the record here. The defendant told the investigating officer that the only way he got paid was to find a return job. He only got paid one way." The court indicated that appellant had balanced money against (1) "acts contrary to a proper regard for human life," (2) "acts that would constitute pure indifference to the consequences of those acts," (3) "facts such that the consequences of the negligent acts could reasonably have been foreseen," and (4) "aggravated, reckless, or flagrantly negligent acts." The court stated, "[i]n other words, the defendant's actions that day balanced cash against common sense."[3]

The court commented that "20-plus hours without sleep" clearly constituted reckless and aggravated behavior which resulted in appellant driving while impaired. The court noted appellant had multiple alternatives, i.e., he could have rested at a Brawley motel, at a rest stop, in a parking lot, or near a police station. The court also noted appellant instead chose to eat and gamble for two hours.[4]

The court later stated, "He made the decision to keep going. He set the cruise control at 65-and-a-half miles per hour, he said that was the best speed, and he headed out. And once he headed out, that Dodge Ram truck became a guided missile, or an unguided missile, depending on the defendant's condition. [¶] The defendant that night was impaired every bit as much as if he'd been drinking or taking dope. Our defendant

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[2] We believe that, fairly read, the trial court's comments to this point pertained to its rationale for denying probation.

[3] As mentioned, the jury convicted appellant of vehicular manslaughter with gross negligence. The court, using CALJIC No. 3.36, instructed the jury on the definition of gross negligence. When the court indicated appellant balanced money against the four above enumerated factors, those factors tracked the language of CALJIC No. 3.36.

[4] The court stated, "There was some mention of [Buttonwillow] in the defendant's statement. Again, that's a couple of three hours away. And, again, he was talking about [Buttonwillow] in the context of looking for money."

did a crass, calculated act. He made a bet that he could make it as far as he wanted to go without an accident. He rolled the dice. But for Mr. Krauss, the dice came up snake eyes. Mr. Krauss lost."

The court then sentenced appellant to prison for the middle term of four years. The court said the base term reflected appellant's age and his "absolutely clean record as far as criminal activities are concerned." We will present additional facts below as appropriate.

2. *Analysis.*

a. *Appellant's Claim that the Trial Court Erroneously Denied Probation is Unavailing and, In Any Event, The Trial Court Properly Denied Probation.*

Appellant claims the trial court erroneously denied probation. However, his claim is unavailing. Appellant failed to raise the issue below; therefore, he waived it. (Cf. *People v. Gonzalez* (2003) 31 Cal.4th 745, 755; *People v. Scott* (1994) 9 Cal.4th 331, 353.)

Even if the issue was not waived, a trial court has broad discretion to determine whether a defendant is suitable for probation (*People v. Welch* (1993) 5 Cal.4th 228, 233), and a defendant bears a heavy burden when attempting to show that the court has abused that discretion. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) A court commits an abuse of discretion by denying probation only when the court's determination is arbitrary, capricious, or beyond the bounds of reason. (See *People v. Warner* (1978) 20 Cal.3d 678, 683.) Moreover, a single aggravating factor may support the denial of probation (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615), and the court is presumed to have considered relevant criteria in the California Rules of Court pertaining to the grant or denial of probation absent a record affirmatively reflecting otherwise. (Cal. Rules of Court, rule 4.409.)[5]

Rule 4.414, sets forth criteria affecting a trial court's decision to grant or deny probation. Moreover, rule 4.408(a) provides, "The enumeration in these rules of some

[5] All further references to rules are to the California Rules of Court.

criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria must be stated on the record by the sentencing judge." Rule 4.410, provides, in pertinent part, that "(a) General objectives of sentencing include: [¶] (1) Protecting society; (2) Punishing the defendant; (3) Encouraging the defendant to lead a law-abiding life in the future and deterring him or her from future offenses; (4) Deterring others from criminal conduct by demonstrating its consequences[.]"

We have set forth the pertinent facts. Fairly read, the record reflects the trial court denied probation, considering the criteria of (1) "[t]he nature, seriousness, and circumstances of the crime as compared to other instances of the same crime" (rule 4.414(a)(1)); (2) "[w]hether the defendant inflicted physical or emotional injury" (rule 4.414(a)(4)); (3) "[t]he degree of monetary loss to the victim" (rule 4.414(a)(5)); (4) "[w]hether the defendant was an active or a passive participant" (rule 4.414(a)(6); and (5) "[w]hether the defendant is remorseful" (rule 4.414(b)(7)). The court also considered various objectives of sentencing, apparently concluding they militated against the granting of probation.

We note as to rule 4.414(a)(1), that the trial court did not rely merely upon the fact and element of death, but the facts that appellant made willful and deliberate actions that led to death. Appellant does not specifically dispute that there was monetary loss to the victim, and appellant conceded below that he was an active participant in the present offense. At a minimum, the trial court was entitled to rely upon these three criteria to deny probation.

Appellant concedes the court was not obligated to follow the probation officer's recommendation that the court grant probation. (*People v. Downey* (2000) 82 Cal.App.4th 899, 910.) Moreover, although appellant argues that the trial court indicated that it denied probation because appellant put money before the lives of others and was callous during his interview with CHP, the trial court never expressly relied on

those factors to deny probation. The trial court did abuse its discretion by denying probation.[6]

b. *Appellant's Claim that the Trial Court Erroneously Imposed the Middle Term is Unavailing and, In Any Event, The Trial Court Properly Imposed That Term.*

Appellant also claims the trial court erroneously imposed the middle term. The claim is unavailing because appellant failed to raise the issue below. (Cf. *People v. Gonzalez, supra,* 31 Cal.4th at p. 755; *People v. Scott, supra,* 9 Cal.4th at p. 353.)

Moreover, even if the issue was not waived, " '[s]entencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in "qualitative as well as quantitative terms" [citation] . . . . We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational.' [Citations.] . . . The trial court need not explain its reasons for rejecting mitigating factors. ([Citation.].)" (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582-1583.)

In the present case, appellant commented to the CHP officer that appellant was not paid for his return journey, "[t]hat's the bad part about it," and appellant could call to determine if "there is anything in the area coming back." Appellant also mentioned his gambling during his return journey. The trial court reasonably could have concluded that appellant's return journey from Brawley was motivated by money. The trial court was also entitled to consider appellant's extensive driving time, and period without sleep,

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[6] We note that, because the decedent was stopped in traffic, the trial court reasonably could have relied upon the "[t]he vulnerability of the victim" (rule 4.414(a)(3)) as a criterion to deny probation. We note that, unlike the rule 4.421(a)(3) aggravating factor, rule 4.414(a)(3) does not require that the victim be "particularly" vulnerable. There is no need to decide whether the fact that the trial court could have relied on vulnerability as a criterion to deny probation renders nonprejudicial any trial court error in denying probation.

prior to the collision.[7] We conclude the trial court did not abuse its discretion by imposing the middle term.

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.

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[7] Our Legislature has recognized in other contexts the danger of lengthy continuous driving. (See Veh. Code, § 21702, subd. (b) ["No person shall drive upon any highway any vehicle designed or used for transporting merchandise, freight, materials or other property for more than 12 consecutive hours nor for more than 12 hours spread over a total of 15 consecutive hours. Thereafter, such person shall not drive any such vehicle until eight consecutive hours have elapsed."].)